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IN THE
Supreme Court of the United States

October Term, 1975

No. 75-169

OMAHA TRIBE OF INDIANS, SANTEE SIOUX TRIBE OF INDIANS, WINNEBAGO TRIBE OF INDIANS, MARY RABBIOSI, FELIX W. WHITE, JR., and DIANA LaPOINTE, Individually and on Behalf of All Other Similarly Situated Persons,
Petitioners,

vs.

WILLIAM A. PETERS, Individually and as NEBRASKA STATE TAX COMMISSIONER and THE NEBRASKA DEPARTMENT OF REVENUE,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

Subject Index

Pages

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statute Involved 2

Statement 2

Argument:

I. No substantial federal question is involved 2

II. The decision of the court of appeals is clearly right 3

Conclusion 8

CASES CITED

Choteau v. Burnett, 283 U. S. 691, 75 L. Ed. 1353, 51 S. Ct. 598 (1931) 7

Five Civilized Tribes v. Commissioner, 285 U. S. 418, 79 L. Ed. 1317, 55 S. Ct. 820 (1935) 7

Goudy v. Meath, 203 U. S. 146, 51 L. Ed. 130 (1906) 4

McClanahan v. Arizona Tax Commissioner, 411 U. S. 164, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973) 3, 5, 6

Mescalero Apache Tribe v. Jones, 411 U. S. 145, 36 L. Ed. 2d 114, 93 S. Ct. 1267 (1973) 5, 6

CASES CITED—Continued

Pages

Tonasket v. State, 79 Wash. 2d 607, 488 P. 2d 281 (1971) 3

Tonasket v. State, 84 Wash. 2d 164, 525 P. 2d 744 (1974) 3

STATUTES CITED

4 U. S. C. § 109 5

25 U. S. C. § 1322 6

28 U. S. C. § 1360 ..... 3, 7

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OPINIONS BELOW

The District Court's opinion is reported in 382 F. Supp. 421 (D. Neb. 1974). The opinion of the Court of Appeals is reported in 516 F. 2d 133 (8th Cir. 1975).

JURISDICTION

The jurisdictional requisites are set forth in the petition.

———o———

QUESTION PRESENTED

Respondents accept the Question Presented set forth in the petition.

———o———

STATUTE INVOLVED

The pertinent provisions of 28 U. S. C. § 1360 are set forth in the petition.

———o———

STATEMENT

Respondents will accept petitioners' Statement of the Case.

———o———

ARGUMENT

I.

No substantial federal question is involved.

This Court has already been presented with a substantially identical question, and resolved it adversely to

the position of petitioners. *Tonasket v. State,* 79 Wash. 2d 607, 488 P. 2d 281 (1971), involved the imposition of the Washington cigarette tax on an Indian reservation. The Court held that Public Law 280 authorized the collection of the tax. This Court, at 411 U. S. 451, 36 L. Ed. 2d 385, 93 S. Ct. 1941 (1973), vacated the judgment and remanded the case for reconsideration in light of *McClanahan v. Arizona Tax Commissioner,* 411 U. S. 164, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973), and some newly enacted state legislation.

On remand, the Washington court, in *Tonasket v. State,* 84 Wash. 2d 164, 525 P. 2d 744 (1974), modified its original opinion in light of the amended state statutes, but as to the question of the authority of the state to impose its cigarette tax on the reservation, the court adhered to its original position.

This Court, at 420 U. S. 915, 43 L. Ed. 2d 387, 95 S. Ct. 1108 (1975), dismissed the appeal for want of a substantial federal question. In view of the fact that the issue in that case was, to all intents and purposes, identical to that involved herein, it is difficult for us to see how there could be a substantial federal question in this case, requiring the granting of certiorari, when there was none in *Tonasket.*

II.

The decision of the Court of Appeals is clearly right.

The question of whether 28 U. S. C. § 1360 authorizes the states involved to impose their taxes on activities taking place on the reservations is an elementary problem

of statutory construction. It would pose no difficulty to someone who did not arrive at the answer before he considered the reasons for the answer. A law student who reached a result different from that reached by the courts below should not expect to get a passing grade on that question.

Subsection 1360(a) makes the "civil laws" of the state applicable to Indian country. Surely no one can argue that the revenue laws of a state are not "civil laws . . . that are of general application to private persons or private property." In that connection we call the Court's attention to *Goudy v. Meath*, 203 U. S. 146, 51 L. Ed. 130 (1906), in which this Court construed an act making Indians "subject to the laws, both civil and criminal, of the state or territory in which they may reside." This Court said:

> "Among the laws to which the plaintiff as a citizen became subject were those in respect to taxation. His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens, and the rule of exemption for him must be the same as for other citizens,—that is, that no exemption exists by implication, but must be clearly manifested. . . ."

If there were any doubt about the proposition that subsection 1360(a) granted taxing powers to the states, it is resolved by subsection 1360(b), which provides that nothing in the section shall authorize the taxation of any real or personal property belonging to any Indian or Indian tribe that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States. Obviously, Congress felt that subsection

1360(a) would grant the states power to tax Indian property, and it was necessary to put in subsection (b) to limit that power. If subsection (a) did not grant taxing power to the states, why would it have been necessary to put in the specific exemption contained in subsection (b)? And if Congress intended to grant a general exemption from state taxation, why didn't it do so? We assume Congress is capable of expressing its wishes in reasonably clear language. Note the general, all-inclusive language used in 4 U. S. C. § 109 to exclude taxation of Indians from the operation of the Buck Act. Petitioners have not attempted to point out what language in subsection (a) would make trust property liable for state taxation, but would not make other tax laws applicable.

It is presumed that every provision of an act has some purpose and effect. If subsection (a) did not grant taxing powers to the state, the exemption specified in subsection (b) is meaningless. The maxim, expressio unius est exclusio alterius, is applicable here. Congress having elected to specify certain limited exemptions, instead of using general language, it manifested its intent not to grant other exemptions.

The decisions of the courts below are perfectly consistent with *McClanghan v. Arizona Tax Commissioner*, 411 U. S. 164, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973), and *Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 36 L. Ed. 2d 114, 93 S. Ct. 1267 (1973). As a matter of fact, *McClanahan* would become unintelligible if the Court were to hold that conferral of jurisdiction over the reservations did not give the states taxing powers. The whole rationale of *McClanahan* was to the effect that Arizona could

not enforce its tax laws on the Navajo Reservation because its laws were not applicable there. The Court referred to the fact that Arizona had not assumed jurisdiction over reservation Indians pursuant to 25 U. S. C. § 1322(a), and said that it could not believe Congress would have required the consent of the Indians affected and the amendment of state Constitutions if the states were free to accomplish the same goals unilaterally by simple legislative enactment. It is true that in a footnote the Court specifically reserved the question of the effect of compliance with 25 U. S. C. § 1322 on the states' taxing powers, but the implication is certainly there that it would change the result.

What petitioners would have this Court say, and what the Court will be saying if it adopts petitioners' position, is that Arizona can't impose its taxes within the Navajo Reservation because it has no civil or criminal jurisdiction over such territory, but even if it did, it still couldn't. The entire basis for the holding in *McClanahan* is destroyed if this case is reversed.

Mescalero Apache Tribe is completely consistent with the decision of the lower court. In that case the Court held that even the tribe itself, when it operated off the reservation, and hence in an area where state laws were applicable, was subject to the state tax laws, pointing up the fact that Indian "immunity" from taxation is simply a reflection of a lack of territorial jurisdiction of the taxing authority, and not a tax exemption, as such. For example, the Court said:

> ". . . Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. See, e. g., Puyallup Tribe v. Department of Game, 391 U. S. 392, 398, 20 L. Ed. 2d 689, 88 S. Ct. 1725 (1968); Organized Village of Kake, supra, at 75-76, 7 L. Ed. 2d 573; Tulee v. Washington, 315 U. S. 681, 683, 86 L. Ed. 1115, 62 S. Ct. 862 (1942); Shaw v. Gibson-Zahniser Oil Corp., 276 U. S. 575, 72 L. Ed. 709, 48 S. Ct. 333 (1928); Ward v. Race Horse, 163 U. S. 504, 41 L. Ed. 244, 16 S. Ct. 1076 (1896). That principle is as relevant to a State's tax laws as it is to state criminal laws, see Ward v. Race Horse, supra, at 516, 41 L. Ed. 244, and applies as much to tribal ski resorts as it does to fishing enterprises. See Organized Village of Kake, supra."

Once state law has been extended to the reservation, the distinction between an on and off-reservation activity disappears.

Throughout this litigation petitioners have spoken of Indian exemption from taxation, which must be specifically repealed before taxes can be imposed. We submit that such an exemption does not exist (except such exemptions as are specifically created by 28 U. S. C. 1360 (b), and similar statutory provisions). The general "exemption" is lack of jurisdiction, which disappears with the conferral of jurisdiction. If such an exemption existed one would expect it to be applicable to federal taxation, also. But this Court has consistently held Indians to be subject to federal income taxation. See *Choteau v. Burnett*, 283 U. S. 691, 75 L. Ed. 1353, 51 S. Ct. 598 (1931), and *Five Civilized Tribes v. Commissioner*, 285 U. S. 418, 79 L. Ed. 1317, 55 S. Ct. 820 (1935). The income in question in this litigation is, of course, subject to federal income taxation. Indeed, if it were not, it would

not be subject to Nebraska's income tax, as Nebraska uses a "piggyback" tax. Why the "exemption" should bar state taxation, but not federal taxation, when both the state and federal governments have jurisdiction of the reservation, has not been explained.

CONCLUSION

The decision of the Court of Appeals was correct. Faced with the identical issue, this Court has once before concluded that no substantial federal question was involved. It should reach the same conclusion again.

Respectfully submitted,

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